

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (E 3338-E) for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs.	Application 00-11-038 (Filed November 16, 2000)
Emergency Application of Pacific Gas and Electric Company to Adopt a Rate Stabilization Plan.	Application 00-11-056 (Filed November 22, 2000)
Petition of THE UTILITY REFORM NETWORK for Modification of Resolution E-3527.	Application 00-10-028 (Filed October 17, 2000)

**ASSIGNED COMMISSIONERS' RULING
CONCERNING PRODUCTION OF COMPUTER MODEL
BY THE CALIFORNIA DEPARTMENT OF WATER RESOURCES**

On September 10, 2001, Pacific Gas and Electric Company (PG&E)¹ filed a "Motion to Compel Production of, and Hearings on, Computer Models Used to Support the Draft Decision of ALJ Pulsifer on the California Department of Water Resources' Revenue Requirement" (PG&E Motion). PG&E asks that its motion be granted immediately on an *ex parte* basis, or otherwise be subject to a shortening of the comment period to one day, unless the Commission defers past

¹ PG&E states that it reserves all legal rights to challenge the decisions or statutes under which it has been required to file its motion, and that nothing in its filing constitutes a waiver of such rights. Also, PG&E states that it reserves any additional legal rights to challenge the requirement to make its filing by reason of its status as a debtor under Chapter 11 of the Bankruptcy Code, and that nothing in its filing constitutes a waiver of such rights.

September 13 its consideration of ALJ Pulsifer's draft decision (DD) on the revenue requirement request of the Department of Water Resources (DWR). PG&E argues that under Sections 1821 and 1822 of the Public Utilities Code, the Commission cannot rely on the results of computer modeling to establish rates unless the Commission ensures access to the underlying computer models and their assumptions, and permits cross-examination and rebuttal concerning these materials.

Most of PG&E's Motion has been rendered moot by subsequent events. We are informed that on September 17, 2001, DWR agreed to grant PG&E access to the revenue requirements model used by DWR, subject to the negotiation of a suitable nondisclosure agreement. We applaud this development and will direct PG&E, DWR and the other parties interested in reviewing the revenue requirements model and its inputs to execute suitable nondisclosure agreements and to designate by 4 p.m. on September 21, 2001, the experts who will be reviewing the model and inputs.

Procedural Background

PG&E's Motion² states that shortly after receiving the DD, it sent a data request to DWR and the Commission's Energy Division. Among other things, PG&E states that it requested the "comprehensive modeling and information" referred to in the DD and the "summary information" referenced in the DD that was provided by DWR for the purpose of deriving the DWR charges for sales to

² Because of the short timeline associated with this phase of the proceeding, PG&E states that its motion does not provide a declaration regarding attempted informal resolution of this discovery dispute, as required by Rule 74.6. Given DWR's prior refusals to provide access to its computer models and related assumptions, PG&E claims that such an informal effort would be futile.

the customers of PG&E, Southern California Edison and San Diego Gas & Electric Company. PG&E states that it also asked whether DWR had used a production simulation model to estimate the allocation of DWR costs among the utilities set forth in Table A-8 of the DD, and if so, whether DWR had used the gas prices shown in Table A-7 (and spot prices derived from production simulations using those fuel prices).³

PG&E's Motion states that as of September 10, it had not received a response from DWR, and that the Energy Division had refused to provide the requested modeling information, stating either that the information was confidential, or that DWR could better respond to the questions.

Discussion

As noted above, the basic issue presented by the PG&E Motion is now moot, because DWR has agreed to produce its revenue requirements model subject to a protective order.

This is the course of action contemplated by Section 1822 of the Code, as well as Rules 74.1-74.7 of our Rules of Practice and Procedure, which were adopted pursuant to § 1822. In addition to requiring that “any computer model that is the basis for any testimony or exhibit in a hearing or proceeding before the commission shall be available to, and subject to verification by, the commission and parties,” subsection (d) of § 1822 directs the Commission to adopt rules that

³ PG&E also states that earlier in this proceeding, it requested production of the computer models and related modeling and forecasting assumptions used by DWR in support of DWR's revenue requirement, and agreed to enter into a nondisclosure agreement to protect any proprietary interest in such models. In response, the DWR refused to produce its computer model or related forecasting assumptions, and also refused to produce the computer models that it relied upon for its conclusion that its revenue requirement could fit within the existing structure of utility rates. *See*, DWR Memorandum to CPUC, August 1, 2001, responding to IOU data requests, pp. 18, 20-25.

“include procedural safeguards that protect data bases and models not owned” by the sponsoring party. Pursuant to § 1822(d), the Commission has adopted Rule 74.7, which gives the ALJ broad powers to fashion appropriate protective orders for computer models and inputs that are confidential or proprietary:

“Each sponsoring party who objects to providing access to any computer model, data base, or other information which is used in a computer model pursuant to this article, on the grounds that the requested material is confidential, proprietary, or subject to a licensing agreement, shall file a motion for a protective order . . . The assigned [ALJ], for good cause shown, may make *any* ruling to protect confidential, proprietary or licensed information from unwarranted disclosure.” (Emphasis added.)

We note that in recent years, this Commission and its ALJs have gained considerable experience in reviewing and implementing nondisclosure agreements designed to protect confidential or proprietary computer models and input data. For example, in a November 16, 1995 ruling in R.93-04-003/I.93-04-002, our Open Access and Network Architecture Development (OANAD) proceeding,⁴ the assigned ALJs set forth the parameters of a form of nondisclosure agreement they considered reasonable for protecting the confidential and proprietary cost data and cost models of Pacific Bell (Pacific) and GTE California Incorporated (GTEC), while at the same time enabling potential competitors of these carriers to participate in a major proceeding designed to determine the network element costs of Pacific and GTEC. For the convenience

⁴ See, Administrative Law Judges’ Ruling Concerning Proposed Protective Order of GTE California Incorporated, *mimeo.* at pp. 7-12 (issued November 16, 1995).

of the parties, the draft nondisclosure agreement attached to this OANAD ruling as Appendix A is also attached to this ruling as Appendix A.

In addition to nondisclosure agreements that protect the sponsoring party's own models and data, we have approved forms of nondisclosure agreements that protect the confidential and proprietary data of third parties. In a February 24, 1997 ruling in the OANAD proceeding, for example,⁵ the assigned ALJ approved a form of agreement that had been negotiated by Pacific, AT&T Communications of California, Inc. (AT&T) and other competitive local carriers for the purpose of protecting switch vendor pricing data, information that in earlier years the Federal Communications Commission had gone to extraordinary lengths to protect. (*Mimeo.* at 3-4.) Despite the history of sensitivity associated with this data, the ALJ's ruling noted that "the switch vendors who would be affected if the SCIS model were turned over to AT&T/MCI for alternative runs . . . have agreed that the form of protective agreement [attached to the ruling] gives them sufficient protection for their data." (*Id.* at 3.) The third party nondisclosure agreement attached to the February 24, 1997 OANAD ruling is attached to this ruling as Appendix B.

It is our expectation that by using these draft nondisclosure agreements and other available forms, PG&E, DWR and the other parties to this proceeding should be able to reach rapid agreement on an appropriate nondisclosure agreement for the revenue requirements model, as well as on the identity of the experts who will review this model and input files on behalf of PG&E and the other parties. In order to ensure that this process stays on track, we will direct

⁵ See, Administrative Law Judge's Ruling Directing Pacific Bell to Produce the Switching Cost Information System (SCIS) Computer Model Subject to A Protective Agreement, issued February 24, 1997.

the parties and DWR to report to ALJ Pulsifer by 4 p.m. on September 21, 2001, whether agreement has been reached on these matters. This report should be served by e-mail on the entire service list. If agreement has not been reached by the September 21 deadline, then parties should specify which particular aspects of the nondisclosure agreement remain in dispute, and the basis for objection to any proposed reviewing expert. We also authorize and direct ALJ Pulsifer or the Law and Motion ALJ(s) to specify the form of nondisclosure agreement that shall be used in the event agreement is not reached by September 21, and to rule on any disputes as to who may review the revenue requirements model on behalf of a particular party.

In accordance with the discussion above, **IT IS RULED** that:

1. Pacific Gas and Electric Company (PG&E) and other affected parties shall forthwith enter into negotiations with the California Department of Water Resources (DWR) concerning (a) the form of nondisclosure agreement appropriate to protect the revenue requirements model and inputs used by DWR and referenced in the September 4, 2001 proposed decision of Administrative Law Judge Pulsifer in this proceeding, and (b) the identity of the persons who may review said model and inputs on behalf of PG&E and other interested parties.

2. DWR, PG&E and other interested parties shall report to ALJ Pulsifer no later than 4 p.m. on September 21, 2001 whether agreement has been reached on the issues specified in the foregoing paragraph. If agreement has not been reached, the report shall specify which aspects of the nondisclosure agreement remain in dispute, if any, as well as the basis for objection to any proposed reviewing expert.

3. In the event agreement is not reached on the issues specified in the first ordering paragraph of this ruling by 4 p.m. on September 21, 2001, then ALJ

Pulsifer, or the Law and Motion ALJ(s) are authorized and directed to issue one or more rulings resolving these issues.

4. A separate ruling will be issued addressing PG&E's request for hearings, and the schedule for any further proceedings relating to parties' review and analysis of the DWR model and related inputs and assumptions.

Dated September 19, 2001, at San Francisco, California.

/s/ LORETTA LYNCH
Loretta Lynch
Assigned Commissioner

/s/ GEOFFREY BROWN
Geoffrey Brown
Assigned Commissioner

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Assigned Commissioners' Ruling Concerning Production of Computer Model by the California Department of Water Resources on all parties of record in this proceeding or their attorneys of record.

Dated September 19, 2001, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.

APPENDIX A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's)	
Own Motion to Govern Open Access)	
to Bottleneck Services and)	
Establish a Framework for Network)	R.93-04-003
Architecture Development of)	
Dominant Carrier Networks)	
_____)	
Investigation on the Commission's)	
Own Motion into Open Access and)	I.93-04-002
Network Architecture Development)	
of Dominant Carrier Networks)	
_____)	

NONDISCLOSURE AND PROTECTIVE AGREEMENT

This Nondisclosure and Protective Agreement ("Agreement") is effective this _____ by and between Pacific Bell ("Pacific") and counsel of record for _____ ("Counsel") in the above-referenced proceeding.

WHEREAS, Counsel have requested Pacific provide certain information and produce certain documents in _____ ("Proceeding"); and

WHEREAS, Pacific has requested comparable information from Counsel; and

WHEREAS, certain of the information requested by Counsel and Pacific may constitute trade secrets or proprietary and confidential, commercial, or financial information;

ACCORDINGLY, the parties here agree and their counsel agree that the following terms and conditions shall govern the use of such information provided to one party by the other in the context of this Proceeding:

1. "Confidential Information" as used herein means any information in written, oral, or other tangible or intangible forms which may include, but is not limited to, ideas, concepts, know-how, models, diagrams, flow charts, data, computer programs, marketing plans, business plans, customer names, and other technical, financial, or business information, which is designated as "confidential" or "proprietary" by Pacific or Counsel in the belief that it contains a trade secret or other confidential research, development, or commercial or financial information. All written Confidential Information to be covered by this Agreement shall be identified by a restrictive legend which clearly specifies the proprietary nature of the information and includes, but is not limited to, the information which Pacific or Counsel has identified in response to data requests or during the hearings in this Proceeding as confidential and proprietary. If the Confidential Information is provided orally, it shall be deemed to be confidential or proprietary if clearly identified as such by Pacific or Counsel, and if within ten (10) business days after disclosure, the party providing the information confirms in writing that such information is subject to this Agreement. Documents containing Confidential Information provided by Pacific or Counsel and all copies thereof shall remain the property of the producing party, and all copies thereof shall be returned to counsel for

the producing party upon request of the producing party after the conclusion of this Proceeding, including any appeals; provided, however, that Confidential Information made a part of the record in this Proceeding may be retained and must be kept secure by Counsel, and provided further that in lieu of return of Confidential Information on which Counsel has added notes or other annotations, Counsel may elect to destroy such Confidential Information and verify in writing to the producing party that such destruction has occurred.

2. Any Confidential Information produced, revealed, or disclosed by Pacific or Counsel in this Proceeding shall be used exclusively for purposes of participating in this Proceeding, including any appeals, and shall not otherwise be used or disclosed for any other purpose. The limitation on the use or disclosure of any Confidential Information disclosed during this Proceeding shall be construed to prohibit disclosure of the Confidential Information and to prohibit making decisions, participating in any decision-making processes, or rendering advice, legal or otherwise, wherein any information or knowledge derived from said Confidential Information is utilized in any manner other than for purposes of this Proceeding.

3. All persons receiving access to Confidential Information shall not disclose it nor afford access to it to any other person not authorized by this Agreement to obtain the Confidential Information, nor shall such Confidential Information be used in any other manner or for any other purpose than as provided in this Agreement.

4. The only persons authorized to receive Confidential Information under this Agreement are Pacific or Counsel for _____, and those persons who qualify and sign an "Agreement for Access to Proprietary and Confidential

Information" ("Agreement for Access"), a copy of which is attached hereto as Appendix A. Each Agreement for Access becomes effective only upon execution by Pacific and Counsel. Persons authorized to receive Confidential Information under this Agreement shall not disclose or divulge Confidential Information to any other person. Employees or agents of Pacific and _____ who are engaged in developing, planning, marketing, or selling products or services, determining the costs thereof, or designing prices thereof to be charged customers are expressly prohibited from access to Confidential Information, and Pacific and Counsel shall use and store Confidential Information in such manner as shall prevent disclosure to such persons.

Certain Confidential Information will be identified as "LAWYERS ONLY" and its authorized use extends only to Pacific's and _____ attorneys, and any independent consultant who is not an employee of Pacific or _____, and regulatory employee(s) of Pacific or _____ who have a need to know and who are not engaged in developing, planning, marketing, or selling products or services, determining the costs thereof, or designing prices thereof to be charged customers ("Permitted Employees"). Access to "Lawyers Only" Confidential Information by Consultants and Permitted Employees shall be by mutual agreement of Pacific and Counsel, which shall not be unreasonably withheld. The parties agree to seek rapid CPUC resolution in case of disputes.

Certain Confidential Information will be identified as "NO COPIES" and its authorized use extends only to Pacific's and _____ attorneys and Consultant at the producing party's San Francisco premises only. Copies will not be provided by the producing party, provided, however, that (1) either party may seek a

ruling from the California Public Utilities Commission ("Commission") or assigned Administrative Law Judge ("ALJ") requiring the other party to provide copies of documents specified as "NO COPIES," and (2) either party does not waive the right to oppose the other party's request.

5. If Pacific or Counsel intends to submit or use any Confidential Information such that it would result in a public disclosure of Confidential Information, including, without limitation, the presentation of prepared testimony, cross-examination, briefs, comments, protests, or other presentations before the Commission, the disclosing party shall contact counsel for the other party as soon as possible and, where practicable, no later than two business days prior to such use, and Pacific and Counsel shall constructively explore means of identifying the Confidential Information so that the proprietary interest therein may be reasonably protected (including but not limited to submission of testimony and briefs under seal and clearing the Hearing Room), while at the same time enabling an effective presentation. If Counsel and Pacific are unable to agree upon a procedure to protect the proprietary interest, or if either party objects to the other's claim that particular information is lawfully entitled to proprietary or confidential status, counsel shall request a ruling from the Commission and/or the assigned ALJ; either party reserves the right to oppose the other party's request. Unless and until a Commission or ALJ ruling provides otherwise, the parties agree to be bound by the terms of this Agreement.

6. This Agreement does not preclude Pacific or Counsel from opposing the production of any information or documents for lack of relevance or from objecting on any grounds to the use of such information in any proceeding.

7. This Agreement shall continue in full force and effect until the Proceeding, including appeals, has ended.

8. Notwithstanding the expiration of this Agreement at the end of the Proceeding, the terms and conditions of this Agreement shall continue to apply to any Confidential Information provided by Pacific or Counsel hereunder.

9. This Agreement shall benefit and be binding upon the parties hereto, their counsel, and each of their respective heirs, successors, assigns, affiliates, subsidiaries, and agents.

10. This Agreement shall be governed in accordance with the laws of the State of California.

(Signature)

(Print Name)

(Business Address)

(____) _____
(Business Telephone)

Counsel for

Date Signed: _____

(Signature)

(Print Name)

(Business Address)

(____) _____
(Business Telephone)

Counsel for

Date Signed: _____

PACIFIC BELL

(Signature)

(Print Name)

Timothy S. Dawson
Senior Counsel
140 New Montgomery St., Rm. 1507
San Francisco, CA 94105

Counsel for Pacific Bell

Date Signed: _____

APPENDIX A

AGREEMENT FOR ACCESS TO
PROPRIETARY AND CONFIDENTIAL INFORMATION

I, _____,

_____, (Print Name) _____, (Print Title)

an employee, officer, director, shareholder, agent, consultant, expert witness [circle appropriate response] of _____, located at _____, hereby acknowledge that I

have received and read a copy of the Nondisclosure and Protective Agreement effective _____ between Pacific Bell ("Pacific") and _____ in connection with R.93-04-003/I.93-04-002

("Agreement"). I understand and agree to be bound by all of the terms and provisions of the Agreement. I further state that neither I nor any firm with which I am affiliated will use any Confidential Information (as defined in the Agreement) to which I obtain access pursuant to said Agreement in connection with the development of any marketing strategies or plans of any firm, person, or entity and that I will use said Confidential Information exclusively for the purpose of participating in the Proceeding (as defined in the Agreement), including any appeals.

Dated: _____, 2000

(Signature)

(Business Address)

(____) _____
(Business Telephone)

Return to:

Timothy S. Dawson
Senior Counsel
140 New Montgomery St., Room 1507
San Francisco, CA 94105

and

Attorney for _____

EXECUTION BY PACIFIC:

Dated: _____, 2000

Counsel for Pacific Bell

APPENDIX B

(SEE CPUC FORMAL FILES FOR APPENDIX B)